

The Honorable John H. Chun

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC. *et al.*,

Defendants.

No. 2:23-cv-0932-JHC

**NEIL LINDSAY'S, RUSSELL  
GRANDINETTI'S, AND JAMIL  
GHANI'S REPLY ISO MOTION TO  
DISMISS AMENDED COMPLAINT**

**NOTED ON MOTION  
CALENDAR: December 8, 2023**

**ORAL ARGUMENT REQUESTED**

NEIL LINDSAY'S, RUSSELL  
GRANDINETTI'S, AND JAMIL GHANI'S  
REPLY ISO MOTION TO DISMISS  
(2:23-cv-0932-JHC)

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## I. INTRODUCTION

The FTC admits it has never “previously sought individual liability” in these circumstances—against non-CEO employees with limited involvement in multi-department decision-making at a large, public company. Dkt. 126 (“Opp.”) 48. The FTC breaks more new ground with its sweeping theory of liability, based not on direct participation or control, but rather on the Individuals’ supposed “participat[ion] in *maintaining*” unlawful conduct, Opp. 40-43 (emphasis added)—a standard so elastic and expansive it assigns liability simply from receiving an internal memo sent to many individuals or participating in a single group meeting. Worse still, the FTC seeks to impose liability against three Individuals while conceding the underlying law “does not provide clarity about how to avoid [liability].” Dkt. 87-1 at 24718.

The FTC’s own allegations, while cherry-picked, lacking context, and distorted, refute any suggestion that the Individuals acted illegally. Not only did no Individual create Prime’s flows, they encouraged their teams to find data-driven solutions to make the flows even more consumer friendly and directed substantial resources to those efforts. *See* Dkt. 67 (“Compl.”) ¶¶ 17, 21, 188, 211-13, 221-28. These allegations cannot support individual liability, especially given that the FTC concedes ROSCA “provide[d] *no details*” to guide the Individuals, 84 Fed. Reg. 52393, 52396, and “clearer guardrails” are needed, Dkt. 87-1 at 24727-28.

## II. ARGUMENT

### A. The FTC Fails to Plead Individual Liability

#### 1. Rule 9(b) Requires Particularized Allegations of Fraud

The FTC’s Rule 9(b) argument “contravenes well-established Ninth Circuit law.” *FTC v. Lights of Am., Inc.*, 760 F. Supp. 2d 848, 851-2 (C.D. Cal. 2010) (criticizing the FTC’s out-of-circuit authorities—including *FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192 (10th Cir. 2005)—as “not compelling”); *FTC v. D-Link Sys., Inc.*, 2017 WL 4150873, at \*1 (N.D. Cal. Sept. 19, 2017) (rejecting the FTC’s “truncated view of Rule 9(b) that our circuit has rejected”).

Rule 9(b) applies to any “claim [that] is ‘grounded in fraud’ or ‘sound[s] in fraud,’ even if fraud is not an essential element.” *In re Finjan Holdings, Inc.*, 58 F.4th 1048, 1057 (9th Cir. 2023). The FTC’s claims sound in fraud, as demonstrated by the alleged use of “misleading language,” “manipulative design elements,” and “deceptive” tactics. Compl. ¶¶ 2, 4, 8, 54, 231, 260. These claims must be pleaded with the particularity that Rule 9(b) requires. *See REX - Real Est. Exch. Inc. v. Zillow Inc.*, 2021 WL 3930694, at \*8 (W.D. Wash. Sept. 2, 2021) (claim that a website was designed “to confuse, mislead, and deceive consumers” must be pleaded with particularity under 9(b)).

The FTC alleges no particularized facts showing that any Individual acted fraudulently. To the contrary, and incredibly, the FTC for the first time seeks to hold Individuals liable for their good-faith participation in a multi-department initiative to *improve* the customer experience.

## 2. Count IV (All Individuals): The FTC Fails to Plead Any Individual Participated in or Controlled Prime’s Cancellation Flows

The FTC alleges the Individuals did not adopt “simpler alternatives” to the cancellation flows proposed by their “subordinates.” Opp. 41. This vague allegation of corporate responsibility is insufficient to support individual liability, particularly as to Grandinetti, who is not even alleged to have overseen Prime at this time. Compl. ¶ 19 (alleging only that Grandinetti currently “oversees Amazon’s Prime subscription program”); *cf. FTC v. Swish Mktg.*, 2010 WL 653486, at \*5–6 (N.D. Cal. Feb. 22, 2010) (allegation defendant acted as CEO insufficient).

As for Lindsay and Ghani, the FTC relies on a single tenuous connection to the cancellation flows: a memorandum Ghani is alleged to have shared with Lindsay in January 2021. Opp. 41. The FTC omits that Lindsay subsequently “elected to prepare [a second] memorandum” to help “facilitate a decision” about “whether to make any changes” to the Prime flows. Compl. ¶ 221. The FTC also omits that just four months later, “as a result of [a] meeting” involving Lindsay and Ghani, Amazon *did* “decide[] to make changes” to the Prime flows. *Id.* ¶ 228.

1 The FTC’s allegations, therefore, show that Lindsay and Ghani acted responsibly, not  
 2 illegally. Their “investment of substantial resources in analyzing [Amazon’s] operations,  
 3 candidly identifying areas for improvement, and following through on a number of  
 4 improvements” only “underscores how this case is very unlike the straightforward deception  
 5 cases upon which the FTC purports to rely.” *FTC v. DIRECTV, Inc.*, 2018 WL 3911196, at \*18  
 6 (N.D. Cal. Aug. 16, 2018). Nor does the FTC explain what changes were proposed in the memo  
 7 shared in January 2021, whether those proposals would have fixed whatever deficiencies the  
 8 FTC believes exist, or why it was illegal for the Individuals to take a few months to analyze  
 9 these issues before Amazon implemented changes. Opp. 41-42; *see also U.S. ex rel. Decesare v.*  
 10 *Americare in Home Nursing*, 2011 WL 607390, at \*8 (E.D. Va. Feb. 10, 2011) (dismissing  
 11 complaint that gave individuals no “notice [of what] actions *they took* that were fraudulent or  
 12 that led to fraud”); *In re ZF-TRW Airbag Control Units Prod. Liab. Litig.*, 601 F. Supp. 3d 625,  
 13 747 (C.D. Cal. 2022) (Rule 9(b) violated where plaintiffs did not allege “which, if any, party  
 14 created each advertisement”).

15 **3. Counts I – III (Grandinetti): The FTC Fails to Allege Grandinetti**  
 16 **Participated in or Controlled Prime’s Enrollment Flows**

17 Apart from Grandinetti’s current title, the FTC identifies just one alleged event  
 18 connecting him to the enrollment flows: in June 2019, Grandinetti attended a meeting with  
 19 representatives from multiple internal organizations, where he was allegedly asked to “break the  
 20 tie” between proposals, and advised co-workers “to improve the checkout enrollment flow as  
 21 much as [they] could . . . while not hurting signups.” Opp. 43. These allegations demonstrate  
 22 only that Grandinetti *supported* improving clarity. The FTC cites no caselaw for its proposed  
 23 should-have-done-more liability standard. *Id.* Nor does the FTC support its repeated,  
 24 conclusory, and disingenuous assertion that Grandinetti’s *current* title as the “Amazon Senior  
 25 Vice President overseeing Prime . . . mean[s] he *had* . . . the authority to direct changes” in 2019.  
 26 *Id.* at 40, 43 (emphasis added).

Moreover, the FTC fails to connect Grandinetti's alleged conduct to the alleged corporate violations. Nowhere does the FTC identify which—if any—of Amazon's alleged "misleading" disclosures or "deceptive" tactics, Compl. ¶¶ 2, 4, 54, 231, are attributable to Grandinetti. Opp. 43. These allegations do "not even come close" to satisfying Rule 9(b). *Decesare*, 2011 WL 607390, at \*8 (complaint failed to show "what connection [the individuals] had" with the "instances of alleged fraud [the company] must defend" or "what impact, if any, [the individual] had on [the company's] future actions").

### **B. This Action Violates the Individuals' Due Process Rights**

This case violates due process for the reasons discussed in Amazon's briefs. Mot. 20–27; Reply 24–29. It further violates the Individuals' constitutional rights for two additional reasons.

First, individuals do not have fair notice where "ensur[ing] compliance with the law" would be an "arduous task, even for individuals with legal research experience and access to online legal databases." *Doe v. Snyder*, 449 F. Supp. 3d 719, 734 (E.D. Mich. 2020); *see also Lightfoot v. D.C.*, 355 F. Supp. 2d 414, 429 (D.D.C. 2005) (individuals cannot be "charged with knowledge" of authorities that are "not practically accessible to them"). The supposed "rules" articulated by the FTC would require all that and more. The FTC's theories borrow language from cases that interpret, among other things, the Fair Credit Reporting Act, the Truth in Lending Act, the Telephone Consumer Protection Act, various state statutes, and multiple states' contract law. *See, e.g.*, Opp. 3 (FCRA and TILA); *Gaker v. Citizens Disability, LLC*, 654 F. Supp. 3d 66, 72 (D. Mass. 2023) (TCPA). The Individuals could not possibly have known how to "conform [their] conduct" to the FTC's standard. *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1155 (9th Cir. 2014).

Second, the FTC does not cite a single case where it sought liability against individual employees at a large public company for failing to correct an alleged corporate violation. The FTC concedes it has not "previously sought individual liability" in these circumstances but attempts to dismiss such novelty as not "relevant." Opp. 47–48. This nothing-to-see-here



1 response fails. Even if an agency’s enforcement of a statute is permissible “under the controlling  
 2 standards,” the agency must provide “affirmative notice” before modifying its “enforcement  
 3 regime.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 243, 251, 256–57 (2012)  
 4 (“isolated” prior notice did “not suffice for the fair notice required”); *United States v. Moss*, 872  
 5 F.3d 304, 314–15 (5th Cir. 2017) (where government had never enforced statute “against  
 6 contractors and subcontractors,” court would not “countenance[] action” that broke “with a half  
 7 century of agency policy”); *Wilson v. Frito-Lay N. Am., Inc.*, 961 F. Supp. 2d 1134, 1147 (N.D.  
 8 Cal. 2013) (despite prior FDA “warning letters” and a “proposed rule,” the defendant “was  
 9 simply not on notice” given “ambiguity” in the text of the regulation); *Upton v. S.E.C.*, 75 F.3d  
 10 92, 98 (2d Cir. 1996) (“The Commission may not sanction Upton pursuant to a substantial  
 11 change in its enforcement policy that was not reasonably communicated to the public.”).

12 The rule of lenity also supports dismissal. It makes no difference that the rule in *Bittner*  
 13 was not joined by a full majority, Opp. 49; it is “settled” law that statutes imposing civil  
 14 penalties must be “construed strictly.” *Comm’r v. Acker*, 361 U.S. 87, 91 (1959); *Pepsi Bottling*  
 15 *Grp., Inc. v. Thomas*, 2010 WL 4622520, at \*4 (W.D. Wash. Nov. 4, 2010) (“penalizing statutes  
 16 must be construed strictly and with lenience exercised in favor of the party who may be the  
 17 object of the penalty”); *United States v. Boyd*, 991 F.3d 1077, 1085–86 (9th Cir. 2021) (the court  
 18 “must strictly construe a tax provision which imposes a penalty” even “independent of the rule of  
 19 lenity”).

### 20 **C. The FTC Cannot Pursue Civil Penalties from the Individuals**

21 Finally, civil penalties are unavailable. Although the FTC argues the Individuals had  
 22 “knowledge fairly implied of *Amazon’s violations*,” Opp. 51 (emphasis added), that is  
 23 implausible for the reasons discussed and, regardless, insufficient. The FTC must allege  
 24 particularized facts to show that each Individual “knew or should have known that *his conduct*  
 25 was unlawful.” *United States v. Dish Network LLC*, 256 F. Supp. 3d 810, 930 (C.D. Ill. 2017)  
 26 (emphasis added). There are no such facts alleged whatsoever.

**III. CONCLUSION**

The FTC's unprecedented and unwarranted prosecution of the Individuals must end.

DATED this 8th day of December, 2023.

I certify that this memorandum contains 1,727 words, in compliance with the Local Civil Rules.

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